Supreme Court, U.S.
FILED

No. _____ 09-772 DEC 29 2009

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In The

Supreme Court of the United States

WESTERN RADIO SERVICES CO.,
an Oregon corporation; and
RICHARD L. OBERDORFER,

Petitioners,

v.

UNITED STATES FOREST SERVICE;
LARRY TIMCHAK; JIM McMILLIN;
BOB ROCK; KRISTEN BAIL;
JIM SAUSER; and DIANA HSIEH,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a company and its principal allege that, after they began filing legal challenges against Forest Service decisions, the agency singled them out for delay and rejection of their permitting requests, and refused to enforce site plan provisions against the company's competitor, does the Administrative Procedures Act preclude a *Bivens* claim for First Amendment Retaliation and "Class of One" Equal Protection?

PARTIES TO THE PROCEEDING

Petitioners (appellants and plaintiffs below):

WESTERN RADIO SERVICES CO., an Oregon corporation; and RICHARD L. OBERDORFER

Represented by Marianne Dugan, Attorney at Law; 259 East Fifth Avenue, Suite 200-D; Eugene, Oregon 97401; (541) 338-7072.

Respondents (appellees and defendants below):

UNITED STATES FOREST SERVICE; LARRY TIMCHAK; JIM McMILLIN; BOB ROCK; KRISTEN BAIL; JIM SAUSER; and DIANA HSIEH

Represented by Kevin Danielson, Ass't U.S. Attorney; and Karen Immergut, U.S. Attorney; U.S. Department of Justice; 1000 SW Third Avenue, Suite 600; Portland, Oregon 97204.

CORPORATE DISCLOSURE STATEMENT

Petitioner Western Radio Services Co. has no parent or publicly held company owning 10% or more of the corporation's stock.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

CITATIONS FOR OPINIONS BELOW

The Ninth Circuit opinion is reported at *Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116 (9th Cir. 2009), and is set forth in the Appendix at App. 1 through App. 22. The District Court's Order dismissing petitioner's case is not reported, but is found at *Western Radio Services Co. v. U.S. Forest Service*, 2008 WL 427787 (D. Or. 2008), and is set forth in the Appendix at App. 23 through App. 36. The Ninth Circuit Order denying the petition for rehearing is not reported, and is set forth in the Appendix at App. 37.

BASIS FOR JURISDICTION IN THIS COURT

The decision of the Ninth Circuit Court of Appeals was entered on August 21, 2009. App. 1-22. The Ninth Circuit denied petitioners' petition for panel rehearing and rehearing *en banc* on October 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This is an action brought under *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971). *Bivens* was the first Supreme Court decision authorizing plaintiffs to bring claims for money damages against individual federal officials based on constitutional violations where no federal statute authorized such a suit; courts have subsequently referred to these as "*Bivens* claims."

The petitioners allege that respondents violated their rights under the First Amendment of the United States Constitution, which reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people . . . to petition the government for a redress of grievances."

The petitioners also allege that respondents violated their right to equal protection ("class of one") under the Fifth Amendment of the United States Constitution (as interpreted in *Bolling v. Sharpe*, 347 U.S. 497 (1954)), which reads in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioners allege that, after they began filing administrative appeals and lawsuits challenging Forest Service decisions, the agency and its employees began taking action and withholding actions which adversely affected them, and that a pattern of such retaliation and animus has occurred over the years. Petitioners brought a *Bivens* claim for First Amendment retaliation and Class of One Equal Protection (Fifth Amendment) violation. The district court dismissed the case on summary judgment for respondents, holding that the Administrative Procedures Act (APA) precluded the *Bivens* claim. The Ninth Circuit affirmed. Those decisions conflict with precedent from this Court.

I. BASIS FOR JURISDICTION IN THE DISTRICT COURT

The district court had jurisdiction under 28 U.S.C. 1331 and principles established in *Bivens*, because this action arises under the laws of the United States, specifically, the First and Fifth Amendments to the U.S. Constitution.

II. RELEVANT FACTS

Petitioner Oberdorfer owns petitioner Western Radio Service Co. (Western), which began service to the public in 1978 and constructed its first Forest Service site on Gray Butte in Oregon. Western provides Commercial Mobile Radio Service (CMRS) to

the public and rents space in its tower facilities to other CMRS providers and radio system operators, in central and eastern Oregon. Most of the suitable locations are on land administered by the Forest Service, and Gray Butte is key to Western's business because of the population and the area served. Gray Butte is an 80-acre designated electronic site, developed in the 1960s. There are three facility owners (lessees) at the Site – Western, Slater Communications and Electronics, and Day Wireless Systems – each with their own building and tower. The three communication site leases with the Forest Service incorporate by reference the 1989 Gray Butte Electronic Site Management Plan (Site Plan).

Since 1986 petitioners have exercised their First Amendment rights, by filing administrative appeals and by filing several lawsuits starting in 1993, against the Forest Service and its employees, challenging adverse permitting and leasing decisions involving petitioners' communication sites. *Western Radio v. Espy*, Civ. No. 93-552-MA (D. Or.), *aff'd*, 79 F.3d 896 (9th Cir.), *cert. den.*, 519 U.S. 822 (1996); *Western Radio v. Espy,* Civ. No. 94-6323-HO (D. Or.); *Western Radio v. Glickman,* Civ. No. 95-679-MA (D. Or.), *aff'd*, 123 F.3d 1189 (9th Cir. 1997); *Western Radio v. Glickman,* Civ. No. 95-6207-TC (D. Or.), *aff'd*, 113 F.3d 966 (9th Cir. 1997); *Western Radio v. Veneman*, Civ. No. 01-6240-HO (D. Or.), *aff'd*, 100 Fed. Appx. 649, 2004 WL 1202039 (9th Cir. 2004); *Western Radio v. Johanns*, 231 Fed. Appx. 684, 2007 WL 1426592 (9th Cir. 2007).

From the time Oberdorfer founded Western until he began filing administrative appeals against the Forest Service he generally experienced good relationships with the agency personnel he dealt with, and their decision-making process regarding Western's permit requests and those of his competitors appeared even-handed. After petitioners began filing appeals and lawsuits, they began to experience unexplained delays in processing and rejections of their Forest Service applications and requests. The lengthy delay and ultimate denial of petitioners' applications at Gray Butte (described *infra*) is simply the latest in a pattern of such behavior by the Forest Service. Petitioners' retaliation claims regarding the earlier actions and inactions were dismissed on statute of limitations grounds in *Western Radio Services Co., Inc. v. Veneman*, 100 Fed. Appx. 649, 2004 WL 1202039 (9th Cir. 2004).

As part of the original development and under the 1981 Site Plan, the Forest Service allowed for sidehill mounting of antennas. In January 1991, Western submitted an application to the Forest Service to locate antennas on the sidehill. Slater objected because one location was close to where it intended to later apply for a new tower. In September 1991, Western submitted a revised application with the locations suggested by Slater. The District Ranger and her successors did not process the revised application but did process Slater's and Day's applications which were submitted later.

The Forest Service eventually denied Western's application, but Western appealed and the agency withdrew the decision. District Ranger Byron Cheney said he would process an application for sidehill antennas if Western submitted a new application in 1998; but Cheney solicited opposition from the other facility owners and summarily denied the new (1998) application.

Petitioners resumed pursuit of the September 1991 application and in 2002 reminded respondents that no final action had been taken on that application. In February 2003, the Ochoco National Forest's quarterly list of proposed actions stated that the agency had decided to drop the Gray Butte Electric Site Management Plan Update, which was to have included Western's sidehill antenna relocation. This proposed action had been on the list for several years.

In July 2003, respondents stated that the agency had not had the resources to update and clarify the Site Plan, and so petitioners' 1991 application had not been further studied. The agency gave no explanation why revising the entire Site Plan was necessary, given that sidehill antennas were expressly allowed by the plan and the Forest had previously authorized sidehill antennas for Slater.

In October 2003, respondents wrote to Oberdorfer acknowledging that the agency had been "tardy" in studying Western's application, but that a review of the Site Plan would be "efficient." From then until January 2007 petitioners furnished documents and

clarification on Western's application at respondents' request, with some of the same documents and clarification being supplied multiple times, all to no avail.

In January 2006, Western amended the application to add two additional sidehill locations for microwave dish antennas, now required because of interference from unauthorized equipment installed at the other Gray Butte facilities. Had one of the two earlier sidehill applications been approved, this would have been a new application instead of an amendment to a pending application. In September 2007, respondents denied Western's September 1991 revised application, approving only the January 2006 amendment.

While this lengthy process was occurring, petitioners were also repeatedly complaining to respondents that Slater and Day were not in compliance with the Site Plan and were causing interference with petitioners' operations. Petitioners explained that because the other lessees would not allow inspection petitioners could not pinpoint the source of the problem, and repeatedly asked respondents to require the other lessees to allow petitioners to inspect their facilities. Although respondents initially promised to do so, they failed to follow through.

In May 2003, respondent Bail told petitioners she had been instructed not to talk to them, and that all Western Radio matters were to go to the Regional office. The Regional office in turn told petitioners it was "restrict[ing] our communications to a written

format," rendering the site meetings proposed by Bail infeasible.

Because of the sixteen years it took to get the sidehill application processed, and respondents' refusal to enforce the Site Plan against Slater, Western spent a great deal of money to work around the problem. Western lost many renters and customers because of interference, and some renters moved to Slater's facility because Slater's lack of compliance with the Site Plan allowed them to do things they could not do in Western's facility. Western has had other requests from customers for sidehill placement and is likely to have more.

III. SUPREME COURT REVIEW IS APPROPRIATE BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH PRIOR SUPREME COURT CASE LAW

The Ninth Circuit held that "the APA leaves no room for *Bivens* claims based on agency action or inaction." App. 17. This view is difficult to harmonize with prior case law. To petitioners' knowledge, there is no prior case holding that the Administrative Procedures Act (APA) categorically precludes a *Bivens* action, and the policy reasons behind allowing a *Bivens* claim to proceed argue against such a result.

In *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468 (1980), this Court made clear that the Federal Tort Claims Act (FTCA) is not an adequate remedy for a constitutional violation. The Court explained in detail

why the FTCA was inadequate, and this reasoning applies *at least* as strongly to the APA:

> First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. *See Butz v. Economou*, [438 U.S. 478,] 505 [(1978)]. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) (WHITE, J., concurring in judgment), surely particularly so when the individual official faces personal financial liability.
>
> Petitioners argue that FTCA liability is a more effective deterrent because the individual employees responsible for the Government's liability would risk loss of employment and because the Government would be forced to promulgate corrective policies. That argument suggests, however, that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.
>
> Second, our decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be

awarded in a *Bivens* suit. Punitive damages are "a particular remedial mechanism normally available in the federal courts," *Bivens*, 403 U.S., at 397, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. Moreover, punitive damages are available in "a proper" § 1983 action, *Carey v. Piphus*, 435 U.S. 247, 257, n. 11 (1978) (punitive damages not awarded because District Court found defendants "did not act with a malicious intention to deprive respondents of their rights or to do them other injury"), and *Butz v. Economou*, suggests that the "constitutional design" would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression. 438 U.S., at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. 2674. Thus the FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.

Third, a plaintiff cannot opt for a jury in an FTCA action, 28 U.S.C. 2402, as he may in a *Bivens* suit. Petitioners argue that this is an irrelevant difference because juries have been biased against *Bivens* claimants. . . . Significantly, however, they do not assert that judges trying the claims as FTCA actions would have been more receptive, and they cannot explain why the plaintiff should not retain the choice.

. . . .

> Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy.

446 U.S. at 21-23 (footnotes deleted).

The APA is an even *less* effective and sufficient remedy, as it does not allow for money damages – much less *punitive* damages. *See* 5 U.S.C. 702 (allowing for judicial review "seeking relief other than money damages"); 5 U.S.C. 706 (court can only compel agency action or set aside agency action). Like the FTCA, it does not allow for claims against individuals. *See* 5 U.S.C. 702. Nor is there a right to a jury, as the relief that can be granted in an APA case is legal, not monetary.

The Ninth Circuit very recently issued a case relevant to this appeal, addressing the interplay between the FTCA and *Bivens* actions. *See Castaneda v. United States*, 546 F.3d 682 (9th Cir. 2008). The Court reiterated that the FTCA is not the exclusive remedy for constitutional violations alleged in that case. Citing *Carlson*, the Court noted:

> "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). This is particularly important in the context of constitutional torts, where the actions of the government itself are on trial. Moreover,

> juries are well-suited to the task of apportioning damages. As Congress noted in explaining the need for jury trials under Title VII, "[j]uries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct." H.R. Rep. No. 102-40, at 72 (1991).

As for the other prong of the *Carlson* "explicit[ ] . . . substitute . . . and . . . equally effective [remedy]" standard, *Carlson*, 446 U.S. at 18-19, it also compels the conclusion that the APA does not preclude relief under *Bivens*. First, the plain text alone of the APA makes it clear that Congress did not explicitly declare it to be a substitute for a *Bivens* action. The APA (5 U.S.C. 701-706) does not "explicitly declare[ ]" itself to be a "substitute for recovery directly under the Constitution." *See Carlson*, 446 U.S. at 18-19.

Moreover, as the Ninth Circuit recently noted in *Castaneda*, where the statute pre-dates the 1971 date of the *Bivens* decision, it "cannot be read as an expression of Congress's desire to substitute the [statute] in place of *Bivens* relief." "*Carlson* requires an intention to *substitute* one form of relief for another, but substitution does not occur, and is in fact impossible, if the person or thing being 'replaced' does not exist." The APA was first enacted in 1946 – long before the *Bivens* decision.

Perhaps even more telling, when the APA was *amended* in 1976 (Pub. L. 94-574, to remove the

defense of sovereign immunity as a bar to judicial review), no amendment was included to preclude a *Bivens* claim. *See* history notes for 5 U.S.C. 702. As the Court noted in *Castaneda*, that provides further evidence that Congress did not intend the APA to preclude a *Bivens* action.

In *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264 (1979), this Court made clear that *Bivens* relief is available to enforce the equal protection component of the Fifth Amendment's Due Process Clause. One of petitioners' claims is under the equal protection clause ("class of one").[1] The Court stated broadly:

> *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), held that a "cause of action for damages" arises under the Constitution when Fourth Amendment rights are violated. The issue presented for decision in this case is whether a cause of action and a damages remedy can also be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. The Court of Appeals for the Fifth Circuit, en banc, concluded that "no civil action for damages" can be thus implied. 571 F.2d 793, 801 (1978). We granted *certiorari*, 439 U.S. 925 (1978), and we now reverse.

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[1] This Court held in *Bolling v. Sharpe*, 347 U.S. 497 (1954), that an "Equal Protection" claim against the federal government is cognizable under the Fifth Amendment rather than the Fourteenth Amendment.

442 U.S. at 229-30. The Ninth Circuit's decision in the instant case undermines this holding.

The Ninth Circuit in this case did not go beyond the first step of the *Bivens* analysis, distinguishing on that point from *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007). The Court held that *Wilkie* was distinguishable because the plaintiff in *Wilkie* had experienced a "patchwork" of harms allegedly caused by the government, whereas (the Ninth Circuit held) petitioners' claims in the instant case were addressable under the APA.

The *Wilkie* Court's discussion of the "patchwork" of claims in that case was not dispositive of its decision, however. As petitioners in the instant case explained, they have been subjected to a *pattern* of retaliation by the government for many years, and this is exactly the type of situation addressed in *Wilkie*. As the Court explained in *Wilkie*,

> . . . Robbins's argument for a remedy that looks at the course of dealing as a whole, not simply as so many individual incidents, has the force of the metaphor Robbins invokes, "death by a thousand cuts." Brief for Respondent 40. It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one's lodge broken into, but something else to be subjected to this in combination over a period of six years, by a series of public officials bent on making life difficult. Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the

> purse. The whole here is greater than the sum of its parts.

127 S. Ct. at 2600-01.

In *Wilkie*, the Supreme Court went on to the second step of the *Bivens* analysis and at that point did hold that there was no *Bivens* claim available. But the *Wilkie* Court explicitly distinguished from First Amendment retaliation cases such as this one. *Id.* at 2601. In the instant case, the Court is presented with the precise situation which the *Wilkie* Court distinguished – alleged federal employee punishment of plaintiffs for speaking out against (and suing) the government. In *Wilkie*, the government's *motivation* (to get Wilkie to give the easement) was acceptable. Here, petitioners allege that respondents' motivation – to retaliate against petitioners – was not proper, and, as the *Wilkie* Court noted, such retaliation has long been held to be an improper motive. *Wilkie* was a special case not applicable here.

The Ninth Circuit erred in holding that the APA precludes a *Bivens* action.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN RADIO SERVICES CO.; RICHARD L. OBERDORFER, *Plaintiffs-Appellants*, v. UNITED STATES FOREST SERVICE; LARRY TIMCHAK; JIM MCMILLIN; BOB ROCK; KRISTEN BAIL; JIM SAUSER; DIANA HSIEH, *Defendants-Appellees.*	No. 08-35186 D.C. No. 04-CV-01346-AA OPINION

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, Chief District Judge, Presiding

Argued and Submitted
May 7, 2009 – Portland, Oregon

Filed August 21, 2009

Before: William A. Fletcher, Carlos T. Bea, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Ikuta

COUNSEL

Marianne Dugan, Eugene, Oregon, for the plaintiff-appellants.

Kevin Danielson, Portland, Oregon, for the defendants-appellees.

OPINION

IKUTA, Circuit Judge:

Richard Oberdorfer and his company, Western Radio Services (collectively, "Western"), brought an action against the United States Forest Service and six of its officers under *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics,* 403 U.S. 388 (1971),[1] and the Administrative Procedure Act (APA), Pub. L. 79-404, 60 Stat. 237 (1946). The district court dismissed the APA claims as moot and granted the government's motion for summary judgment on the *Bivens* claims, holding that the APA provided an adequate alternative remedy which foreclosed a remedy under *Bivens.* Western appeals only the dismissal of the *Bivens* claims. We agree with the district court that the APA provides Western an adequate alternative remedy, and we affirm.

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[1] *Bivens* was the first Supreme Court decision authorizing plaintiffs to bring claims for money damages against individual federal officials based on constitutional violations where no federal statute authorized such a suit; courts have subsequently referred to these as "*Bivens* claims."

I

Because this appeal comes to us from the grant of a motion for summary judgment, we relate the facts in the light most favorable to Western. *See Nolan v. Heald Coll.*, 551 F.3d 1148, 1150 (9th Cir. 2009).

Gray Butte is an 80-acre area within the Ochoco National Forest in central Oregon. The Forest Service leases various sites in the area to electronic communications companies, including Western and two other companies, Slater Communications and Electronics and Day Wireless Systems. Each lease agreement incorporates by reference the terms of the Forest Service's Gray Butte Electronic Site Management Plan, which "establish[es] a guide for the land manager to base decisions concerning the development of the site in conformance with" ten stated environmental objectives.

Western first constructed radio towers on Gray Butte in 1978, and it maintained good relations with the Forest Service for the first five years of its operations there. In 1986, Western began bringing administrative appeals of various Forest Service decisions. In 1993, Western filed several lawsuits challenging Forest Service permit and leasing decisions. After Western began challenging Forest Service decisions, it experienced unfavorable treatment from the Forest Service, including unexplained delays in processing its applications and rejections of its applications. On January 3, 1991, Western applied to the Forest Service for permission to place additional

antennae on Gray Butte. Slater Communications objected, and Western submitted a revised application. Years later, in 1998, the Forest Service denied Western's application. Western appealed this denial, and in 1999 the Forest Service withdrew its denial and took Western's application back under consideration. More years passed, and in 2002 and 2003, Western pressed Forest Service officials to take action on its still-pending 1991 application. Between 2003 and 2007, there were communications between Western and various Forest Service officers, with the Forest Service continuing to request additional documents and clarifications and adding new procedural requirements to Western's application.

While Western was attempting to secure permission to install its side-hill antennae, Western also complained to the Forest Service regarding problems it was having with other Gray Butte lessees. In August 2000, Western informed a Forest Service officer that Slater Communications was not in compliance with the Site Plan, and that Slater Communications "would not allow inspection" by Western. Although Western believed other lessees operated equipment that did not "meet the technical standards" required by the applicable regulations and the Site Plan, Western was unable to specify the nature of the lessees' noncompliance because Western was unable to conduct its own inspection of the lessees' sites.

In August 2002, the Forest Service began the process of scheduling an inspection of Gray Butte.

In response, Western again raised complaints about other lessees' noncompliance with the Site Plan. Western also asked the Forest Service to appoint representatives of other Gray Butte lessees, including Western, to the inspection team. In September 2002, the Forest Service inspected all three facilities at Gray Butte, but did not include lessees on its inspection team. The Forest Service found only minor deficiencies at Slater Communications and Day Wireless. Following this inspection, Western continued to send emails to the Forest Service accusing other lessees of noncompliance and demanding enforcement of the Site Plan.

On September 22, 2004, Western brought claims against the Forest Service and the individual defendants under *Bivens* and the APA, alleging that the defendants failed to stop other lessees' noncompliance with the Site Plan, failed to allow Western to conduct site inspections of other lessees' facilities, and delayed taking action on Western's application to install the two additional "side-hill" antennae on Gray Butte. Western claimed that these delays and inactions violated the First Amendment (by treating Western unfavorably in retaliation for its prior litigation against the Forest Service), the Fifth Amendment (by treating Western less favorably than the other lessees without a rational basis), and the APA (by unlawfully withholding or unreasonably delaying administrative action).

In January 2006, Western submitted a revised application seeking permission to construct four

additional microwave antennae on the side-hill locations. The Forest Service prepared an environmental assessment for the proposal, and, on September 4, 2007, issued an administrative decision allowing Western to build two of the four proposed antennae. The district court then dismissed Western's APA inaction claims as moot because the agency had acted. The court also granted the defendants' motion for summary judgment on Western's *Bivens* claims, holding that the APA provided an adequate alternative remedy to a *Bivens* action.

Western appeals only the grant of summary judgment on his *Bivens* claims. Our review is de novo. *See Nolan,* 551 F.3d at 1150.

II

At the outset, we note that the Supreme Court has held that no *Bivens* remedy is available against a federal agency, *see FDIC v. Meyer,* 510 U.S. 471, 484 (1994), and on that ground we affirm the district court's dismissal of Western's *Bivens* claims against the Forest Service itself. We therefore turn to whether the circumstances of this case require us to recognize an implied right of action under *Bivens* against the individual Forest Service officers for their alleged violations of Western's constitutional rights.

A

In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009). Specifically, the Court in *Bivens* allowed a plaintiff to bring a damages action in federal court against individual federal officials for violating the Fourth Amendment, despite the absence of any federal statute authorizing such an action. *See Bivens*, 403 U.S. at 397. Within the next few years, the Supreme Court extended Bivens in two additional cases where the Court concluded an implied right of action for money damages was consistent with congressional intent. In *Davis v. Passman*, the Court permitted a political appointee to bring a sex-discrimination claim against a congressman, despite the absence of such a remedy in Title VII of the Civil Rights Act of 1964, because there was no evidence that Congress intended to prevent political appointees from seeking relief under a judicially created remedy. 442 U.S. 228, 247 (1979). Similarly, in *Carlson v. Green*, the Court allowed a prisoner's action against prison officials for failure to provide proper medical attention in violation of the Eighth Amendment's prohibition against cruel and unusual punishment, notwithstanding the availability of a remedy under the Federal Tort Claims Act (FTCA), because there was evidence that Congress did not intend the FTCA to be a substitute for recovery under *Bivens*. 446 U.S. 14, 20 (1980).

Since *Carlson*, however, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). The Court has focused increased scrutiny on whether Congress intended the courts to devise a new *Bivens* remedy, and in every decision since *Carlson*, across a variety of factual and legal contexts, the answer has been "no." *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 297 (1983) (declining to allow an implied right of action for military personnel who allegedly suffered racial discrimination at the hands of their superior officers); *Bush v. Lucas*, 462 U.S. 367, 368 (1983) (declining to allow an implied right of action for a federal civil-service employee who allegedly suffered unconstitutional employment actions); *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (declining to allow an implied right of action for disabled persons who were allegedly denied Social Security disability benefits in violation of their due process rights); *Wilkie v. Robbins*, 551 U.S. 537, 561-62 (2007) (declining to allow an implied right of action for a landowner who allegedly suffered harassment and intimidation by federal officials in violation of his rights under the Fourth and Fifth Amendments).

In *Wilkie*, the Court distilled its 35-year history of *Bivens* jurisprudence into a two-step analysis for determining congressional intent as to the appropriateness of a *Bivens* remedy. *See id.* at 550. First, the Court determines whether there is "any alternative, existing process for protecting" the plaintiff's

interests. *Id.* Such an alternative remedy would raise the inference that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Id.* at 550, 554. The Court has explained that, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Chilicky,* 487 U.S. at 423; *see also Castaneda v. United States,* 546 F.3d 682, 701 (9th Cir. 2008). Accordingly, the Court has refrained from creating a judicially implied remedy even when the available statutory remedies "do not provide complete relief" for a plaintiff that has suffered a constitutional violation. *Corr. Servs. Corp.,* 534 U.S. at 69 (quoting *Bush,* 462 U.S. at 388). "So long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose[s] judicial imposition of a new substantive liability." *Id.*

We have interpreted these cases as holding that, "[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment." *Berry v. Hollander,* 925 F.2d 311, 314 (9th Cir. 1991) (internal quotation marks omitted); *accord Adams v. Johnson,* 355 F.3d 1179, 1185 n.3 (9th Cir. 2004) (explaining that the adequate alternative remedy "need not be perfectly comprehensive"). In *Chilicky,* for example, the Court declined to create a *Bivens*

action for recovery of money damages for "emotional distress and for loss of food, shelter and other necessities" caused by the wrongful denial of Social Security benefits. 487 U.S. at 419, 426. The Court reasoned that the existence of a comprehensive and elaborate remedial scheme for wrongly withheld Social Security disability benefits evinced a "congressional unwillingness to provide consequential damages for unconstitutional deprivations" of those benefits. Because Congress "provide[d] meaningful safeguards or remedies" for the plaintiffs, and because "personal liability for official acts" would "undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established," the Court held that Congress had implicitly foreclosed a *Bivens* remedy even though it had not provided complete relief to the plaintiffs. *Id.* at 425.

Second, if the Court cannot infer that Congress intended a statutory remedial scheme to take the place of a judge-made remedy, the Court next asks whether there nevertheless are "factors counseling hesitation" before devising such an implied right of action. *Wilkie,* 551 U.S. at 550. Even where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has declined to create a right of action under *Bivens* when doing so "would be plainly inconsistent with Congress' authority in this field." *Chappell,* 462 U.S. at 304. In *Chappell,* for example, enlisted military personnel had no damages remedy of any kind against their superiors for

constitutional violations, but the Court nevertheless declined to create a damages remedy under *Bivens*. 462 U.S. at 301. The Court explained that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Id.* at 304.

The Court also found "special factors counselling hesitation" in *Wilkie*, and accordingly declined to create a *Bivens* remedy. 551 U.S. at 550. In *Wilkie*, a ranch owner claimed that officers of the Bureau of Land Management tried to coerce him into granting the federal government an easement over his land. The ranch owner alleged that Bureau officials trespassed on his property; broke into his lodge and left trash inside; videotaped his vacationing clients from a hilltop while they "sought privacy to relieve themselves"; revoked the grazing permit and special-use permit that allowed him to "run guest cattle drives"; levied fines against him for trespassing on federal land; convinced the local United States Attorney's office to bring a meritless criminal prosecution against him; and tried to convince the local sheriff to impound his cattle. *Id.* at 542-47. The ranch owner therefore brought *Bivens* claims against the officers, alleging that they violated his Fourth and Fifth Amendment rights by "retaliating against the exercise of [his] ownership rights." *Id.* at 549.

In the first step of its *Bivens* analysis, the Court examined whether there was "any alternative, existing process" available to the ranch owner, and broke his claims "into four main groups: torts or tort-like injuries inflicted on him, charges brought against him, unfavorable agency actions, and offensive behavior by Bureau employees falling outside those three categories." *Id.* at 551. Addressing the criminal charges, the Court concluded that, "[f]or each charge," the plaintiff "had some procedure to defend and make good on his position . . . although he had mixed success, he had the means to be heard." *Id.* at 552. Addressing the unfavorable agency actions, the Court concluded that, "[f]or each claim, administrative review was available, subject to ultimate judicial review under the APA." *Id.* The Court further concluded that the plaintiff had some type of remedy in tort for the alleged trespasses and vandalism, though noting some uncertainty as to whether a remedy was available against the officers' videotaping of his guests. *Id.* at 553. In sum, the Court concluded that the plaintiff had "an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." *Id.*

Nonetheless, the Court held that the case could not be disposed of at step one of its *Bivens* analysis because "the forums of defense and redress" were "a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules." *Id.* at 554. Thus, the Court stated, "[i]t would be hard to infer

that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim." *Id.* The Court therefore concluded that *Wilkie* was a case "for *Bivens* step two, for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." *Id.* The Court explained that it must "make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* at 550 (quoting *Bush*, 462 U.S. at 378).

In the second step of this two-step analysis, the Court noted that the plaintiff's allegation amounted to the claim that the officers had pushed too hard on the government's behalf, and the Court reasoned that it would be too difficult to draw a line between "legitimately hard bargaining" and "illegitimate pressure." *Id.* at 562. In light of the "serious difficulty of devising a workable cause of action," the Court concluded that "a general *Bivens* cure would be worse than the disease," and therefore held that the plaintiffs had no implied right of action for damages under *Bivens*. *Id.* at 561.

B

Applying *Wilkie*'s two-step analysis to this case, we begin by asking whether the existence of "any alternative, existing process" available to Western, or

other indication of Congressional intent, raises the inference that Congress "expected the Judiciary to stay its *Bivens* hand." *Id.* at 550, 554.

At the outset, we note that *Wilkie* itself gave us a strong indication that the APA constitutes an "alternative, existing process" for Western's damages claims based on agency actions and inactions. The Court in *Wilkie* observed that the ranch owner had an adequate remedy for the "unfavorable agency actions," because, "[f]or each [such] claim, administrative review was available, subject to ultimate judicial review under the APA." *Id.* at 552.[2] *Wilkie* moved on to step two because the plaintiff had only a patchwork of different remedies for addressing the other, non-administrative claims. *Id.* at 554.

Although *Wilkie* does not explain in detail how it determined that the APA was an adequate alternative remedy for unfavorable agency actions, our own consideration of the APA leads to the same conclusion. The APA expressly declares itself to be a comprehensive remedial scheme: it states that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled

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[2] The specific final agency actions in *Wilkie* were the Bureau's cancellation of the ranch owner's right-of-way, its decision to reduce the length of the special recreational use permit from five years to one and subsequent termination of that permit, and its revocation of his cattle-grazing permit. *Id.* at 552-53.

to judicial review," 5 U.S.C. § 702, and then sets forth the procedures for such review, *see id.* §§ 704, 706. "The APA's comprehensive provisions . . . allow any person 'adversely affected or aggrieved' by agency action to obtain judicial review thereof, so long as the decision challenged represents a 'final agency action for which there is no other adequate remedy in a court.'" *Webster v. Doe,* 486 U.S. 592, 599 (1988) (quoting 5 U.S.C. §§ 701-06). Specifically, the APA authorizes a reviewing court to:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (B) contrary to constitutional right, power, privilege, or immunity. . . .

5 U.S.C. § 706(1)-(2); *see also Darby v. Cisneros,* 509 U.S. 137, 143-47 (1993) (discussing the provisions and structure of the judicial-review sections of the APA). Like the "administrative structure and procedures of the Social Security system" at issue in *Chilicky,* the APA is vast in scope and affects "virtually every American." 487 U.S. at 424. Indeed, the APA is, by its nature, broader in scope than the Social Security system: absent some statutory or other exception, the APA's "comprehensive provisions" provide the backup or default remedies for all interactions between individuals and all federal agencies, not just the Social Security Administration. 5 U.S.C. §§ 702, 704;

Webster, 486 U.S. at 599. The fact that APA's procedures are available where no other adequate alternative remedy exists further indicates Congress's intent that courts should not devise additional, judicially crafted default remedies. *See* 5 U.S.C. § 704.

The APA does not provide for monetary damages, though it does allow "specific relief," including the payment of money to which a plaintiff is entitled. *Bowen v. Massachusetts,* 487 U.S. 879, 895 (1988). Nor does the APA allow claims against individuals or provide a right to a trial by jury. Both the Supreme Court and this court have concluded, however, that remedial schemes lacking such features may be adequate alternatives, provided that the absence of such procedural protections was not inadvertent on the part of Congress. *See Chilicky,* 487 U.S. at 424-25; *Libas Ltd. v. Carillo,* 329 F.3d 1128, 1129 (9th Cir. 2003) (holding that no *Bivens* remedy was available where a statutory scheme allowed importers to challenge customs agents' erroneous assessments of import duties but did not provide for consequential damages or a right of action against the individual agents); *Janicki Logging Co. v. Mateer,* 42 F.3d 561, 564-65 (9th Cir. 1994) (holding that the Contract Dispute Act provided an adequate alternative remedy to a *Bivens* action, even though it did not provide for damages claims against individual officers or the right to a jury trial).

In sum, the design of the APA raises the inference that Congress "expected the Judiciary to

stay its *Bivens* hand" and provides "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," *Wilkie*, 551 U.S. at 550, 554, notwithstanding the unavailability of money damages against individual officers or the right to a jury trial. With respect to agency action and inaction, we conclude that Congress "has considered the universe of harms that could be committed in the program's administration and has provided what Congress believes to be adequate remedies." *Adams*, 355 F.3d at 1185. We therefore conclude that the APA leaves no room for *Bivens* claims based on agency action or inaction.

C

This conclusion resolves Western's claims. Western alleges that the individual defendants were responsible for the Forest Service's denial of Western's application to place additional radio antennae on Gray Butte and its failure to take administrative action against other site lessees when it was required by the Site Plan to do so. Provided Western complied with the APA's procedural requirements, *see* 5 U.S.C. § 704, such agency actions and inactions could be challenged under the APA, *see id.* at § 706(1)-(2); *see also Wilkie*, 551 U.S. at 552; *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 979, 983-84 (9th Cir. 2006) (reviewing Forest Service action under the APA). In light of Congress's provision of an adequate statutory remedial scheme, and because Congress could reasonably conclude that

limitations on the available remedies were appropriate in this context, we conclude that Western cannot maintain its *Bivens* claims against the individual defendants for causing the Forest Service's alleged actions and inactions.

Western does not dispute that it has alternative remedies under the APA; it did, after all, bring APA claims against the Forest Service in this case. But Western raises several arguments as to why we should nevertheless allow it an implied right of action.

First, Western points to our decision in *Castaneda*, where we followed the Supreme Court's precedent in *Carlson* and held that the FTCA did not preclude a *Bivens* action for a prisoner alleging violations of his Eighth Amendment rights by prison officials. *See* 546 F.3d at 688. We noted various deficiencies in the FTCA's remedial scheme, and Western argues that *Carlson* and *Castaneda* are controlling because the APA has the same deficiencies. We disagree. In analyzing whether the FTCA was an inadequate alternative remedy, *Castaneda* mentioned the unavailability of monetary damages against individuals and lack of a right to a jury trial. *Id.* at 689-90. But as we have already explained, the case law of the Supreme Court and this court makes clear that a remedial scheme may be adequate even if it does not include these elements. *See Chilicky*, 487 U.S. at 424-25, *Libas Ltd.*, 329 F.3d at 1129. *Castaneda*'s decision to allow a *Bivens* claim in the Eighth Amendment context was thus driven

primarily by a unique deficiency in the FTCA: its authorization of only those actions allowed by "the law of the place where the act or omission occurred." *Id.* at 690. As we explained:

> [T]he remedies we and the Supreme Court have held to preclude *Bivens* were deliberately crafted by Congress and applied uniformly throughout the republic. We are aware of no case holding a remedial scheme that is entirely parasitic on state law to be a substitute for a *Bivens* remedy.

Castaneda, 546 F.3d at 690. No such concern is present with the APA, a freestanding federal statute that applies uniformly throughout the country. Because the APA's remedial scheme does not share the FTCA's lack of uniformity, *Castaneda* is not controlling.

Second, Western cites *Carlson*'s analysis of congressional intent. In *Carlson*, the Court concluded that Congress did not intend for the FTCA to be a substitute for *Bivens* because the FTCA had already been enacted when *Bivens* was decided. Moreover, *Carlson* noted that a post-*Bivens* amendment to the FTCA did not include a statement of congressional intent to create a substitute for *Bivens*. Western points to the fact that the APA, like the FTCA, predated *Bivens*, and that Congress similarly failed to address *Bivens* in a post-*Bivens* amendment to the APA. According to Western, this legislative history compels the inference that Congress did not intend the APA to be a substitute for Bivens.

Again, we disagree. *Carlson* did not rely only on congressional silence in post-*Bivens* amendments to the FTCA; rather, *Carlson* noted that "the congressional comments accompanying that amendment made it *crystal clear* that Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. at 19-20 (emphasis added). The Court quoted legislative history expressly stating that the FTCA "should be viewed as a counterpart to the *Bivens* case." *Id.* at 20 (quoting S. Rep. No. 93-588, p. 3 (1973)). Western points to no similar indications of congressional intent with respect to the APA. Both the Supreme Court and this court have often declined to create *Bivens* actions to supplement statutory remedies, even in situations where Congress gave no affirmative indication that it intended to preclude judge-made relief. *See, e.g., Chilicky,* 487 U.S. at 425-26; *Bush,* 462 U.S. at 378; *Adams,* 355 F.3d at 1185; *Libas Ltd.,* 329 F.3d at 1129; *Janicki Logging,* 42 F.3d at 564-65; *Berry,* 925 F.2d at 315-16. Congress's silence in post-*Bivens* amendments to the APA does not raise the inference that it intended to allow an implied right of action.

Finally, Western argues that *Wilkie* is distinguishable from this case because here the individual defendants' alleged misdeeds were the result of illegitimate motives. Western claims that the individual officers' misdeeds were based on an illegitimate desire to retaliate against Western for exercising its First Amendment right to petition the government for redress of grievances and to discriminate against

Western without a rational basis. In *Wilkie,* by contrast, the Court refrained from creating a *Bivens* remedy due to concerns about the "difficulty in defining a workable cause of action" against government employees for overzealous conduct based on *legitimate* motivations. 551 U.S. at 555-56 ("[U]nlike punishing someone for speaking out against the Government, trying to induce someone to grant an easement for public use is a perfectly legitimate purpose."). Because such "line-drawing difficulties" are not present here, *id.* at 557, Western argues that *Wilkie* does not prevent us from allowing it a right of action under *Bivens.*

Western's argument misunderstands *Wilkie,* which considered the defendants' legitimate motives at the second stage of its two-step inquiry. In step one of the analysis, the Court concluded that the alternative remedies available to the plaintiff were "a patchwork" and therefore inadequate. *Id.* at 554. The Court then moved on to "*Bivens* step two," in which it considered whether there were "special factors counselling hesitation before authorizing a new kind of federal litigation" and "weigh[ed] reasons for and against the creation of a new cause of action." *Id.* at 550, 554. Only at step two did the Court consider the legitimacy of the defendants' motives. In the present case, our analysis ends at step one: we have determined that the APA is an adequate alternative remedy for Western's claims, and we therefore have no need to "weigh[ ] reasons for and against the

creation of a new cause of action." *Wilkie*, 551 U.S. at 554.

III

Because Western's claims against the individual defendants are based on Forest Service actions or inactions, we conclude that the remedies available to Western under the APA constitute an "alternative, existing process" that "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 550. Western's alternative remedies under the APA, although not perfectly comprehensive, are adequate. *Id.* at 543; *Adams*, 355 F.3d at 1185 n.3. This conclusion ends our two-step *Bivens* analysis, and so we need not determine whether a *Bivens* right of action is applicable to a claim alleging a violation of the First Amendment. *See Iqbal*, 129 S. Ct. at 1948 (noting prior decisions refusing to extend *Bivens* to First Amendment claims, but declining to reach the issue).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WESTERN RADIO SERVICES CO., an Oregon corporation; and RICHARD L. OBERDORFER,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE; LARRY TIMCHAK; JIM MCMILLIN; BOB ROCK; KRISTEN BAIL; JIM SAUSER; and DIANA HSIEH,

Defendants.

Civ. No. 04-1346-AA

OPINION AND ORDER

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AIKEN, Judge:

Plaintiffs Western Radio Services (Western Radio) and Richard Oberdorfer filed suit alleging claims against the United States Forest Service (Forest Service) under the Administrative Procedures Act

(APA), 5 U.S.C. § 701 *et seq.*, and claims against six former and present Forest Service employees under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (*Bivens*). Plaintiffs allege that the Forest Service unlawfully withheld action on a special use application for side-hill antennas, and that the individual defendants conspired to delay action on the application in retaliation for plaintiffs' previous lawsuits against the Forest Service.

Defendants move for summary judgment, arguing that *Bivens* liability is not warranted in these circumstances and that plaintiffs' APA claims are moot. On December 4, 2007, the court heard oral argument on defendants' motion. The motion is granted.

BACKGROUND

Western Radio is an Oregon corporation solely-owned by Oberdorfer. Since 1978, Western Radio has obtained leases to operate communication facilities on land managed by the Forest Service. Western Radio currently provides various electronic communication services and has filed special use applications with the Forest Service to expand its capacity. On behalf of Western Radio, Oberdorfer prepares the applications and communicates with Forest Service personnel on administrative matters.

Gray Butte is an 80-acre site located in the Ochoco National Forest approximately fifteen miles

north of Prineville and designated within the Crooked River National Grassland Land and Resource Management Plan (LRMP). Western Radio, Day Wireless Systems (Day Wireless), and Slater Communications and Electronics (Slater Communications) own communication facilities and lease space on Gray Butte. The three lessees provide a variety of services, including broadcast translation, wireless internet and cellular phone services, and internal communication facilities for businesses and government agencies.[1] Under the lease agreements, the Forest Service may, but is not required, to inspect the lessees' facilities. The leases do not authorize one lessee to inspect the facilities of another.

By letters dated January 3, 1991 and September 10, 1991, Western Radio requested permission to install two antennas at Gray Butte "to the side-hill." According to plaintiffs, the Forest Service did not process the application. Western Radio submitted a revised request on October 19, 1998 and again sought approval for two sidehill antennas.[2] On December 3, 1998, the Forest Service denied Western Radio's sidehill antenna application.

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[1] The leases for communication services on Gray Butte expired on December 31, 2006. The lessees have requested new leases and are currently operating with temporary leases.

[2] Plaintiffs dispute defendants' characterization of the 1998 application as a "revised" application and assert that Western Radio's 1991 application remained pending after denial of the 1998 application. Regardless, this factual dispute is not material and does not defeat summary judgment.

On December 7, 1998, plaintiffs appealed the denial of Western Radio's application, and on January 4, 1999, the Forest Service withdrew its December 3, 1998 decision.

On September 22, 2004, plaintiffs filed suit against defendants.

On January 24, 2006, Western Radio submitted another application and requested four sidehill antennas. By letter dated March 17, 2006, plaintiffs further clarified the content of their sidehill antenna application. The Forest Service subsequently prepared an Environmental Assessment of the antennas proposed in Western Radio's 2006 application.

On September 4, 2007, the Forest Service issued a Decision Notice and Finding of No Significant Impact (Decision Notice) with respect to Western Radio's request. The Decision Notice allows Western to construct two of the requested sidehill antennas.

On September 17, 2007, defendants moved for summary judgment.

STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the

substantive law on the issue. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Elec.*, 809 F.2d at 630.

DISCUSSION

A. *Bivens* Claim

Plaintiffs assert a *Bivens* claim against the individual defendants, based on the theory that they conspired to intentionally delay action on Western Radio's sidehill antenna application in retaliation for plaintiffs' prior litigation against the Forest Service.

Plaintiffs contend that the delay in granting Western Radio's sidehill antenna application was part of a pattern of retaliation and discrimination against plaintiffs, further evidenced by defendants' favorable treatment of Day Wireless and Slater Communications. Plaintiffs contend that defendants did not require inspections of the Day Wireless or Slater Communication facilities and allowed them to be in non-compliance with the Gray Butte Site Management Plan (Site Plan). Plaintiffs further maintain that defendants provided advantages to Western Radio's competitors in order to chill plaintiffs' First Amendment rights.

Defendants move for summary judgment on grounds that the court should not imply a *Bivens* remedy when a comprehensive statutory scheme – the APA – provides an adequate remedy for the Forest Service's alleged failure to act. Defendants also argue that plaintiffs' claims of favorable treatment to Western Radio's competitors implicate a common law tort action and lack factual support.[3]

In *Bivens* the Supreme Court held that the victim of a Fourth Amendment violation could assert a claim for damages against individual federal officers involved in an unlawful search and seizure, regardless of the fact that no statute authorizes damage claims

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[3] Defendants also argue that qualified immunity insulates them from liability. Because I decline to impose *Bivens* liability, I do not address the issue of qualified immunity.

against individual federal actors. *Bivens,* 403 U.S. at 396; *see also Wilkie v. Robbins,* 127 S. Ct. 2588, 2597 (2007). Accordingly, *Bivens* authorizes courts to award damages against federal officials to compensate plaintiffs for violations of their federal constitutional rights.

"However, *Bivens* remedies are not available to compensate plaintiffs for all constitutional torts committed by federal officials." *Western Center For Journalism v. Cederquist,* 235 F.3d 1153, 1156 (9th Cir. 2000). Rather, "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified." *Wilkie,* 127 S. Ct. at 2597; *see also Schweiker v. Chilicky,* 487 U.S. 412, 421-22 (1988) ("The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."). Thus, while the Supreme Court has extended *Bivens* liability to employment discrimination in violation of the Due Process Clause and Eighth Amendment violations by prison officials, the Court has declined to extend liability to claims of First Amendment violations by federal employers, harm to military personnel through service activity,

and wrongful denials of Social Security benefits. *Wilkie,* 127 S. Ct. at 2597-98 (citing cases).

The first step in deciding whether to fashion a *Bivens* remedy is to determine "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 2598 (citing *Bush v. Lucas,* 462 U.S. 367, 378 (1983)). Thus, a *Bivens* remedy is unavailable when "'Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur' in the course of administering a federal program." *Cederquist,* 235 F.3d at 1156 (quoting *Schweiker,* 487 U.S. at 423). Under the second step of the *Bivens* analysis, courts must "[weigh] reasons for and against the creation of a new cause of action. . . ." *Wilkie,* 127 S. Ct. 2600. "[T]he federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Bush* 462 U.S. at 378.

Here, defendants argue that the APA provides judicial review to "compel agency action unlawfully withheld or unreasonably delayed" where a plaintiff "asserts that an agency failed to take a discrete agency action that it is required to take." 5 U.S.C. § 706(1); *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004) (emphasis omitted). Accordingly, defendants argue that because plaintiffs may seek to

compel them to take action on Western Radio's sidehill antenna requests, *see* 36 C.F.R. § 251.54(g)(4), the APA provides a comprehensive statutory scheme that bars *Bivens* liability. Plaintiff counters that the Supreme Court has reiterated that "the Government may not retaliate for exercising First Amendment speech rights," thus recognizing *Bivens* liability for retaliation against the exercise of First Amendment rights. *Wilkie,* 127 S. Ct. at 2601.

I find plaintiffs' *Bivens* claim foreclosed by the Supreme Court's recent opinion in *Wilkie.* There, federal agency officials discovered that they had failed to record a non-exclusive easement granted to the government by a former landowner, and that the new owner took title to the property free of the easement. *Wilkie,* 127 S. Ct. 2593. The agency officials pressured the landowner to grant an easement, and he refused. *Id.* In the years following the landowner's refusal, the officials trespassed on the landowner's property to conduct a survey, canceled a negotiated right-of-way, alleged violations of the landowner's special use permit, brought administrative charges against the landowner for trespass and other land-use violations, fined the landowner for repairing a public road, brought criminal charges of impeding and interfering with a federal employee, terminated the landowner's special use permit, revoked the landowner's grazing permit, videotaped the landowner's ranch guests to "catch" the landowner trespassing, and encouraged other agency officials to impound the landowner's cattle. *Id.* at

2594-2596. The landowner brought a *Bivens* claim against the agency officials, arguing that their actions were in retaliation against his exercise of property rights, and that the whole of the officials' conduct – "death by a thousand cuts" – warranted *Bivens* liability. *Id.* at 2600.

While the Court found that various processes existed to "vindicat[e] virtually all of his complaints," it nonetheless recognized that the "patchwork" of state and federal administrative and judicial proceedings applying statutes, regulations, and common law rules did not adequately remedy the whole of the officials' six-year course of conduct. *Id.* at 2600-01. Further, the Court found that imposing limits on government agents when engaging in necessary and legitimate "hard-bargaining" weighed against creating a *Bivens* remedy. *Wilkie* 127 S. Ct. 2601-02.

Unlike the landowner in *Wilkie,* plaintiffs did not suffer a myriad of administrative and judicial actions taken against them at the hands of defendants. Rather, plaintiffs complain of delay and inaction on the part of defendants in processing Western Radio's application for sidehill antennas, complaints that the APA was specifically crafted to redress.[4] *See* 5 U.S.C.

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[4] Although plaintiffs complain that defendants have taken no action on an application pending since 1991, none of the individual defendants were involved in Western Radio's requests prior to 2002. *See* Oberdorfer Decl., pp. 3-7 and Exs. F-I, M-R, T-V. Moreover, Western Radio revised and supplemented its

(Continued on following page)

§ 706(1). Thus, the APA provides an alternative and comprehensive remedy to protect plaintiffs' interest in compelling government action – a convincing reason for this court to refrain from crafting a *Bivens* remedy in this case. *Wilkie,* 127 S. Ct. at 2600; *Schweiker,* 487 U.S. at 425 (even though Social Security statutory scheme did not provide "complete relief" for hardships caused by delays in receiving benefits, "Congress, however, has not failed to provide meaningful safeguards. . . ."); *Bush,* 462 U.S. at 378; *Adams v. Johnson,* 355 F.3d 1179, 1184 (9th Cir. 2004) ("[W]here Congress has provided *some* mechanism for relief, *Bivens* claims are precluded.") (citation omitted); *Janicki Logging Co. V. Mateer,* 42 F.3d 561, 564 (9th Cir. 1994) ("Moreover, the fact that the courts could create a more complete remedy for the asserted wrong does not mean that they should, for 'Congress is in a better position to decide whether or not the public interest would be served by creating it.'") (quoting *Bush,* 462 U.S. at 390).

To the extent plaintiffs allege that defendants' failure to enforce the Site Plan interfered with Western Radio's business or contract relations, constitutional claims cannot supplant traditional tort law. *See Siegert v. Giley,* 500 U.S. 226, 234-35 (1991); *Daniels v. Williams,* 474 U.S. 327, 332 (1986); *McCarthy v. Mayo,* 827 F.2d 1310, 1315 (9th Cir.

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applications on several occasions and did not actively pursue the sidehill antennas until 2003 – one year prior to filing suit. *See id.*

1987). Accordingly, Bivens liability is not appropriate where adequate remedies under the APA are available to contest the Forest Service's delay or inaction, or where plaintiffs' underlying claim is akin to a common law tort action.

Moreover, plaintiffs present no evidence to suggest retaliation, malice, or conspiratorial acts on the part of individual defendants. *See* Oberdorfer Decl., Exs. D (Oberdorfer Dep. pp. 87-91), F-I, M-Q, U, V; Defendants' Memorandum, Exs. B, C. Indeed, when asked what actions were outside the scope of defendants' official duties, Oberdorfer merely restated his general dissatisfaction with their response to Western Radio's applications and their enforcement of the Gray Butte Site Management Plan – actions within defendants' discretion. Defendants' Memorandum, Ex. A (Oberdorfer Dep., pp. 68-70). Likewise, plaintiffs present no specific evidence to suggest that defendants failed to enforce the Site Plan or treated Western Radio differently from its competitors without rational basis. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) (per curiam). Indeed, plaintiffs are unable to describe the activities of Western Radio's competitors that evince favorable treatment. *See* Oberdorfer Deposition, pp. 97-91 [sic]. Plaintiffs make much of the fact that Slater Communications constructed a tower that was not in compliance with the Site Plan. However, plaintiffs present no evidence to support this claim and challenged the construction of Slater's tower in

separate judicial proceedings. *See Western Radio Services Co, Inc. v. Esty,* 79 F.3d 896 (9th Cir. 1996).

Ultimately, if the Supreme Court found the "hard-bargaining" in *Wilkie* – with federal agents committing trespass, revoking permits, and filing numerous administrative and criminal charges – insufficient to establish *Bivens* liability, plaintiffs' tepid allegations of delay, inaction and favorable treatment fall far short. Accordingly, summary judgment is granted on plaintiffs' *Bivens* claim.

B. APA Claims

Plaintiffs' second and third claims for relief allege that the Forest Service violated the APA by unlawfully withholding and unreasonably delaying action on plaintiffs' sidehill antenna application, and that the Forest Service's actions with respect to the application were arbitrary, capricious and contrary to law. *See* 5 U.S.C. 706(1), (2)(A). Defendants argue that plaintiffs' APA claims are now moot, because the Forest Service issued a Decision Notice approving, in part, Western Radio's sidehill antenna application.

At oral argument, plaintiffs conceded that the Forest Service's September 2007 Decision Notice likely rendered their APA claims moot. Even without plaintiffs' concession, I agree that summary judgment on plaintiffs' APA claims is appropriate. Although the Forest Service's Decision Notice was not completely favorable to Western Radio, no action remains to be taken with respect to the sidehill antenna

application. *See S. Utah Wilderness Alliance,* 542 U.S. at 65 ("[A] court can compel the agency to act, but has no power to specify what the action must be."). Furthermore, any claim that the Forest Service's Decision Notice was arbitrary and capricious is not properly before this court. Before seeking federal judicial review of the Decision Notice, plaintiffs must exhaust their administrative remedies and file an administrative appeal consistent with the Forest Services's special use appeal regulations. *See* 36 C.F.R. part 251, subpt. C; *id.* §§ 251.82(a)(8), 251.101; *Clouser v. Espy,* 42 F.3d 1522, 1532-33 (9th Cir. 1994). Accordingly, there is no decision this court may render to grant plaintiff relief.

CONCLUSION

For the reasons explained above, defendants' motion for summary judgment (doc. 69) is GRANTED.

IT IS SO ORDERED.

Dated this 12 day of February, 2008.

/s/ Ann Aiken
Ann Aiken
United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN RADIO SERVICES CO.; RICHARD L. OBERDORFER, Plaintiffs-Appellants, v. UNITED STATES FOREST SERVICE; LARRY TIMCHAK; JIM MCMILLIN; BOB ROCK; KRISTEN BAIL; JIM SAUSER; DIANA HSIEH, Defendants-Appellees.	No. 08-35186 D.C. No. 04-CV-01346-AA District of Oregon, Eugene ORDER (Filed Oct. 5, 2009)

Before: W. FLETCHER, BEA, and IKUTA, Circuit Judges.

The panel votes to deny the petition for panel rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No. 09-772

In the Supreme Court of the United States

WESTERN RADIO SERVICES COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioners, who operate communications facilities on land managed by the United States Forest Service, brought suit alleging that the Forest Service withheld action on a special use application for "side-hill" antennae and failed to respond to complaints lodged against other lessees, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Petitioners also sued six former and present Forest Service employees under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioners alleged that the employees conspired to delay action on the application and failed to enforce the applicable Site Plan against other lessees in retaliation for petitioners' previous litigation against the Forest Service, in violation of the First Amendment. They also alleged that the employees treated them less favorably than other lessees, in violation of the Fifth Amendment. The question presented is:

Whether the court of appeals erred in declining to extend *Bivens* remedies in this case on the ground that the APA provides an adequate, alternative remedy for the agency's alleged delays and inaction.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 578 F.3d 1116. The opinion of the district court (Pet. App. 23-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2009. A petition for rehearing was denied on October 5, 2009 (Pet. App. 37). The petition for a writ of certiorari was filed on December 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Western Radio Services Company is an Oregon corporation solely owned by petitioner Richard L. Oberdorfer (collectively, Western Radio). Gray Butte

is an 80-acre area within the Ochoco National Forest in Oregon. The United States Forest Service manages that area and leases various sites to electronic communications companies, including Western Radio, Slater Communications and Electronics, and Day Wireless Systems. Each lease agreement incorporates the terms of the Gray Butte Electronic Site Management Plan (Site Plan), which "establish[es] a guide for the land manager to base decisions concerning the development of the site in conformance with" stated environmental objectives. Pet. App. 3, 24-25 (brackets in original).

Western Radio first constructed radio towers on Gray Butte in 1978 and, in later years, has filed special use applications with the Forest Service to expand its capacity. In 1991, the company requested authorization to install two antennae "to the side-hill" of their leased property. The Forest Service did not respond to the application and, in October 1998, Western Radio submitted another request, again seeking approval for two side-hill antennae. In December 1998, the Forest Service denied the application. Western Radio appealed and the Forest Service withdrew its decision. Over the next eight years, the Forest Service requested additional documents and clarifications but did not take action on the application. In January 2006 (while this case was pending in the district court), Western Radio submitted a revised application seeking permission to construct four antennae and, after preparing an environmental assessment, the Forest Service issued a decision allowing the company to build two of the four proposed antennae. Pet. App. 3-6, 24-26. None of the individual respondents were involved in Western Radio's requests prior to 2002. *Id.* at 32 n.4.

Over the years, Western Radio also complained to the Forest Service about other Gray Butte lessees' failure to comply with the Site Plan and requested that the Forest Service enforce strict compliance. In August 2000, for example, Western Radio informed a Forest Service employee that Slater Communications was not in compliance with the Site Plan and that it suspected other lessees were also noncompliant, but that absent inspection (which the lessees would not permit) it could not specify the nature of the violations. Western Radio requested permission to participate in the agency's site inspection. In 2002, the Forest Service inspected the sites on its own and concluded that only minor deficiencies existed at the other lessee sites. Pet. App. 4-5. Again, none of the individual respondents were involved prior to 2002. *Id.* at 32 n.4.

Beginning in 1986, Western Radio pursued several administrative appeals challenging other Forest Service decisions. And, in 1993, petitioners filed several lawsuits contesting the agency's permitting and leasing decisions. Pet. App. 3; C.A. E.R. 161.

2. In 2004, petitioners filed this suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the Forest Service and six of its current and former employees. Pet. App. 2, 24. Petitioners' APA claims alleged that the Forest Service unlawfully withheld and unreasonably delayed action on the side-hill antennae application and on the complaints lodged against other Gray Butte lessees, and that such actions were arbitrary, capricious and contrary to law. C.A. E.R. 32-34. The *Bivens* claims alleged that from 2002 until the present, the individual Forest Service employee-respondents

conspired to intentionally delay action on the side-hill antennae application, failed to stop other lessees' non-compliance with the Site Plan, and refused to allow Western Radio to conduct site inspections of the other facilities—and that those actions were undertaken in retaliation for petitioners' previous litigation against the Forest Service, in violation of the First Amendment. *Id.* at 31-32. They also alleged that respondents violated the Fifth Amendment because they treated Western Radio less favorably than other lessees without a rational basis. *Id.* at 34-35.

Respondents moved for summary judgment. The district court granted summary judgment on the APA claims. Pet. App. 35-36. As noted above, while the litigation was pending in the district court, the Forest Service approved, in part, Western Radio's side-hill antennae application. The court explained that if petitioners wished to challenge that decision, they would need to exhaust their administrative remedies consistent with the Forest Service regulations, and it dismissed the APA claims as moot. *Id.* at 36.

On the constitutional claims, the court concluded that "the APA provides an alternative and comprehensive remedy" and because petitioners' complaints "of delay and inaction on the part of [respondents] in processing Western Radio's application for sidehill antennas, [are] complaints that the APA was specifically crafted to redress," no implied *Bivens* remedy was available. Pet. App. 32-33. Moreover, the court found that, on the merits, petitioners presented no evidence actually suggesting retaliation on the part of the individual respondents, or suggesting that the respondents treated Western Radio any differently than its competitors or did so without a rational basis. *Id.* at 34.

3. Petitioners appealed only with respect to the *Bivens* claims. Pet. App. 6. At the outset, the court of appeals observed that no *Bivens* remedy was available against the Forest Service. *Ibid.* (citing *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (declining to extend *Bivens* to claims against federal agencies)). As to the individual Forest Service employees, the court applied the two-step analysis set forth in *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007), and found the first step dispositive. As the court explained, the first question is "whether the existence of 'any alternative, existing process' available to [petitioners], or other indication of Congressional intent, raises the inference that Congress 'expected the Judiciary to stay its *Bivens* hand.'" Pet. App. 13-14 (quoting *Wilkie*, 551 U.S. at 550, 554). The court observed that "*Wilkie* itself" strongly suggested that the APA constitutes such a process; just as the ranch owner in *Wilkie* "had an adequate remedy for the 'unfavorable agency actions,' because, '[f]or each [such] claim, administrative review was available, subject to ultimate judicial review under the APA,'" *id.* at 14 (brackets in original) (quoting *Wilkie*, 551 U.S. at 551-552), so too for petitioners' claims "based on agency actions and inactions." *Ibid.* This Court moved on to step two in *Wilkie*, explained the court, only because of the "patchwork" of remedies available for the variety of non-administrative claims alleged in that case. *Ibid.*

The court of appeals then independently concluded that the APA is, in fact, an adequate alternative remedy: it is a comprehensive remedial scheme for review of final agency action, authorizing a court to, *inter alia*, "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action * * * found to be * * * contrary to constitutional

right, power, privilege, or immunity." Pet. App. 15 (quoting 5 U.S.C. 706(1)-(2)). The court also considered and rejected each of petitioners' arguments to the contrary. *Id.* at 16-22. In the end, the court held that because petitioners' "claims against the individual [respondents] are based on Forest Service actions or inactions, * * * the remedies available to [petitioners] under the APA constitute an 'alternative, existing process' that 'amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" *Id.* at 22 (quoting *Wilkie*, 551 U.S. at 550). The court declined to decide "whether a *Bivens* right of action is applicable to a claim alleging a violation of the First Amendment" in any case. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a cause of action for damages against federal law-enforcement agents who allegedly violated the plaintiff's Fourth Amendment rights. The Court's more recent decisions, however, "have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68-69 (2001) (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)); see *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) ("[I]n most instances [this Court] has found a *Bivens* remedy unjustified."). This Court has emphasized that "any freestanding damages remedy for a claimed constitutional violation" is "not an automatic entitlement." *Wilkie*, 551 U.S. at 550. To the contrary,

when "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," this Court has not created additional remedies under *Bivens*. *Schweiker*, 487 U.S. at 423.

In *Wilkie*, the Court set forth a two-step inquiry to decide whether to extend a *Bivens* remedy to new constitutional interests and contexts. 551 U.S. at 550. The first question is "whether any alternative, existing process for protecting the [plaintiff's] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Ibid.* If so, the court should "stay its *Bivens* hand." *Id.* at 554. If there is no such adequate, alternative remedy, however, a *Bivens* action may still be inappropriate if "special factors counsel[] hesitation." *Id.* at 550.

a. The court of appeals correctly determined, at step one of the inquiry, that petitioners have an alternative, adequate remedy for relief under the APA that forecloses an independent *Bivens* remedy in this case. Pet. App. 13-22. As the court explained (*id.* at 14-15), the APA expressly declares itself to be a comprehensive remedial scheme for claims of agency action or inaction. See 5 U.S.C. 702. Congress has provided through the APA the means of raising challenges, including constitutional challenges, to the type of agency actions at issue here. Section 706 expressly authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (B) con-

trary to constitutional right, power, privilege, or immunity." 5 U.S.C. 706(1)-(2).

The court of appeals' decision is consistent with this Court's decision in *Wilkie*. In that case, the constitutional allegations were premised on actions allegedly taken by employees of the Bureau of Land Management (BLM) to extract an easement from the landowner plaintiff. 551 U.S. at 542-547. As alleged by the plaintiff, the offensive actions taken by the BLM employees were myriad; some were prosecutorial in nature, some sounded in tort, some were conventional agency actions, and some difficult to categorize. *Id.* at 551-553. With respect to those properly categorized as conventional administrative actions, the Court recognized that for each claim "administrative review was available, subject to ultimate judicial review under the APA." *Id.* at 552. It was only because of the "patchwork" of other remedies that the plaintiff would have to pursue in a variety of forums that the Court had difficulty inferring congressional intent to preclude a *Bivens* action, requiring it to proceed to the second step of the analysis. Even on those facts, however, the Court still found "no intuitively meritorious case for recognizing a new constitutional cause of action." *Id.* at 554. A fair reading of the Court's analysis supports what the court of appeals here held: where the only allegations can all be characterized as instances of "conventional agency action," *id.* at 552, administrative review subject to judicial review under the APA provides an adequate, alternative remedy foreclosing recognition of an independent *Bivens* remedy.

In this case all of petitioners' claims may be adequately adjudicated under the APA. As the court of appeals recognized, petitioners did "not dispute that it has alternative remedies under the APA; it did, after all,

bring APA claims against the Forest Service in this case." Pet. App. 18. Accordingly, the court of appeals correctly held that a *Bivens* remedy was foreclosed.

b. Petitioners rehash arguments made and properly rejected by the court of appeals below. Pet. 9-15. Those arguments lack merit and do not warrant this Court's review.

First, petitioners contend (Pet. 9-12) that the APA alternative is not an adequate substitute because it does not provide for monetary (or punitive) damages, it does not permit claims against individuals, and it does not provide a right to a jury trial. But, as the court of appeals held, alternative "remedial schemes lacking such features may be adequate alternatives, provided that the absence of such procedural protections was not inadvertent on the part of Congress." Pet. App. 16 (citing *Chilicky*, 487 U.S. at 424-425). In *Chilicky*, the Court declined to imply a *Bivens* remedy for alleged due process violations by Social Security officials, even though the review scheme provided by the Social Security Act offered no possibility of damages. 487 U.S. at 423-425. The Court explained that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," it is inappropriate for a court to afford "additional *Bivens* remedies." *Ibid.* Petitioners make no attempt to suggest that Congress "inadvertent[ly]" neglected to provide for monetary damages for alleged constitutional violations arising from reviewable agency action.

Second, petitioners contend (Pet. 12-13) that the APA cannot be read as expressing Congress's intent to preclude a *Bivens* remedy because the APA predated

the *Bivens* decision and when Congress amended the APA post-*Bivens* it did not address that decision. For this argument, petitioners rely on *Carlson* v. *Green*, 446 U.S. 14 (1980), but as the court of appeals explained, the "congressional comments accompanying" the amendment to the Federal Tort Claims Act (FTCA) at issue in that case "made it *crystal clear* that Congress views FTCA and *Bivens* as parallel, complementary causes of action." Pet. App. 20 (quoting *Green*, 446 U.S. at 19-20). Whereas the legislative history there "expressly stat[ed] that the FTCA 'should be viewed as a counterpart to the *Bivens* case,'" *ibid.* (quoting *Green*, 446 U.S. at 20), petitioners can point to no such evidence of congressional intent with respect to the APA. This Court has previously declined to create a *Bivens* remedy where, as here, Congress has given no affirmative indication that it intended the statutory cause of action only as a complement to *Bivens*. See *Chilicky*, 487 U.S. at 425-426; *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983).

Finally, petitioners argue (Pet. 14-15) that, like the plaintiff in *Wilkie*, they have been subject to a "pattern" of retaliation and, unlike the plaintiff in *Wilkie*, that retaliation was premised on an improper and unconstitutional motive. Petitioners confuse the "patchwork" of claims in *Wilkie* that prompted the Court to look beyond the APA alternative remedy to the special factors at issue, with the "pattern" of retaliation they allege in this case. The *Wilkie* Court did not proceed to the second step of the inquiry because there was a "pattern" of administrative actions that needed redress; it did so because the actions were both administrative and non-administrative and, as a result, the Court could not infer that Congress intended the "patchwork" of remedies in different forums to substitute for a *Bivens* remedy.

Where the APA is an adequate, alternative remedy for all of petitioners' claims (whether or not they constitute a "pattern"), there is "no need to 'weigh[] reasons for and against the creation of a new cause of action.'" Pet. App. 21-22 (brackets in original) (quoting *Wilkie*, 551 U.S. at 554).

2. Petitioners have not attempted to demonstrate any circuit conflict on this issue, and we are aware of none. Indeed, several courts of appeals have held, in accord with the decision below, that a plaintiff's right to judicial review under the APA precluded a *Bivens* remedy. See, *e.g.*, *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (holding that "the existence of a right to judicial review under the APA is sufficient to preclude a *Bivens* action"), cert. denied, 547 U.S. 1110 (2006); *Miller* v. *United States Dep't of Agric. Farm Servs. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("[T]he existence of a right to judicial review under the APA is, alone, sufficient to preclude * * * a *Bivens* action."); cf. *Munsell* v. *Department of Agric.*, 509 F.3d 572, 589-591 (D.C. Cir. 2007) (suggesting it might be appropriate to recognize a *Bivens* remedy where the alleged unconstitutional conduct drove the plaintiff from the regulated industry rendering APA relief unavailable, but declining to decide the issue).

This case is also a poor vehicle for review of the question presented because the district court has already determined that petitioners failed to present sufficient evidence on their *Bivens* claims to survive summary judgment. See Pet. App. 34 (concluding that petitioners "present no evidence to suggest retaliation, malice, or conspiratorial acts on the part of individual [respondents]," and that petitioners "present no specific evidence to suggest that [respondents] * * * treated

Western Radio differently from its competitors without rational basis"). Thus, regardless of whether a *Bivens* remedy exists for petitioners' claims, respondents would still be entitled to summary judgment on the merits. In these circumstances, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2010